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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In re Application of  
SOUTHWEST EDUCATIONAL MEDIA FOUNDATION  
OF TEXAS, INC.

For construction permit, new FM  
Stanton, TX

**REC'D MASS MED BUR**

BPED-870918NF

**MAY 05 1988**

To: Chief, Mass Media Bureau

**PUBLIC REF ROOM**

PETITION FOR RECONSIDERATION

Southwest Educational Media Foundation of Texas, Inc. ("Semoft"), by its counsel, herewith submits its petition for reconsideration of the Commission's action of April 15, 1988, returning the above-captioned application as unacceptable for tender. In support whereof, the following is stated:

1. The Commission's stated reason for returning Semoft's application as unacceptable for tender was Semoft's failure to provide a contour map with the 70 dBu contour, hereinafter referred to as "city grade" contour.

2. As will be shown herein, Semoft had no notice that the Commission had adopted a change in its rules to require noncommercial applicants to place a city grade contour over the city of license, and it is apparent that the Commission's adoption of a change in the rules was improperly promulgated. Moreover, the Commission has never properly noticed the requirement that noncommercial applicants submit a city grade contour with their applications.

3. Section 73.513 of the Commission's Rules states that noncommercial applicants operating on unreserved channels are

required to comply with Sections 73.201 through Section 73.213 of the rules pertaining to commercial allocations. It further states that "In all other respects, stations operating on Channels 221 through 300 are to be governed by the provisions of this subpart and not subpart B."

4. The rule which makes a city grade contour over the city of license mandatory for commercial stations is Section 73.315. It is not among the rules made applicable to noncommercial stations pursuant to Section 73.513. Furthermore, the note to Section 73.315(a) formerly stated: "NOTE: The requirements of paragraph (a) of this section do not apply to noncommercial educational FM broadcast stations." Therefore, noncommercial applications in the commercial band were excluded from the city grade contour requirement prior to the Commission's Order, Oversight of the Radio and TV Broadcast Rules, paragraph (g), 52 Fed. Reg. 10568 at 10570 (April 2, 1987).

5. The fact that Semoft was unaware of any change in the rules is evident from the fact that on March 3, 1988, Semoft submitted a petition for reconsideration of the return of its application for a new FM station in Post, Texas (BPED-870827MG) in which its analysis of the rules indicates its lack of knowledge of any change in the rules to require a city grade contour over the city of license. Semoft learned for the first time of such a requirement when the Commission cited the above-referenced oversight order in connection with the dismissal of its application for a new FM station in Albuquerque, NM on March 23, 1988. The Commission did not make reference to that order in the Post proceeding, and Semoft was totally unaware of its

existence.

6. The pertinent paragraph (g) of the referenced order reads as follows:

(g) By Order, adopted March 4, 1986 (51 FR 9963, March 24, 1986), the Commission added a Note to @ 73.315, Transmitter location, following paragraph (a). The Note clarified that minimum field strengths specified in @ 73.315(a) did "not apply to noncommercial educational FM broadcast stations." However, this exclusion is only applicable if the noncommercial FM station operates on reserved channels. Some operate on commercial channels. The Note is clarified herein to grant exclusion as originally intended to the field strength requirements of @ 73.315(a) only if the noncommercial FM station operates on reserved channels 200 through 220. (See rule change item 10).

7. The citation to the pertinent rule given by the FCC is 47 C.F.R. 73.313(a). It is believed that 73.315(a) was intended. Counsel researched said rule on the Lexis computer prior to filing the petition for reconsideration in the Post proceeding. The note to the rule had not been changed in the Lexis database. According to Lexis representatives, their database is current, thereby indicating that the Code of Federal Regulations has not yet updated its rules to include the change in the footnote. The new language of the note as set forth in the Commission's oversight order reads as follows:

Note. -- The requirements of paragraph (a) of this section do not apply to noncommercial educational FM broadcast stations operating on reserved channels. (Channels 200 through 220)

8. Unfortunately, this language in and of itself does not provide notice that the rule applies to noncommercial applicants operating on non-reserved channels. Rather, it simply makes it clear that rule does not apply to noncommercial applicants

operating on reserved channels. The note is now silent in regard to noncommercial applicants operating on non-reserved channels. While the referenced oversight order makes it clear what the Commission intended, the language of the rule itself does not make it clear.

9. As discussed in para. 3, supra, Section 73.513 of the Commission's Rules states that noncommercial applicants operating on unreserved channels are required to comply with Sections 73.201 through Section 73.213 of the rules pertaining to commercial allocations. It further states that "In all other respects, stations operating on Channels 221 through 300 are to be governed by the provisions of this subpart and not subpart B." Thus Section 73.513 of the rules appears to exclude the applicability of Section 73.315(a) to noncommercial applicants, and the new language of the footnote to the rule does not change that fact.

10. While an argument can be made that Section 73.315(a) is made applicable to noncommercial applicants by Section 73.508, such an argument requires a very strained reading of the Commission's Rules. Section 73.508 reads as follows:

Section 73.508 Standards of good engineering practice.

(a) All noncommercial educational stations operating with more than 10 watts transmitter output power shall be subject to all of the provisions of the FM Technical Standards contained in Subpart B of this part. Class D educational stations shall be subject to the definitions contained in @ 73.310 of Subpart B of this part, and also to those other provisions of the FM Technical Standards which are specifically made applicable to them by the provisions of this subpart.

(b) The transmitter and associated transmitting equipment of each noncommercial educational FM station licensed for transmitter output power above 10 watts

must be designed, constructed and operated in accordance with @ 73.317.

11. This rule pertains to good engineering practices as more particularly set forth in Section 73.317. There is no indication whatever that this rule has any applicability to the city grade coverage requirement. Further, the footnote to Section 73.315 makes it clear that the Commission did not intend the city grade requirement to apply to noncommercial applicants. The requirement that a licensee place a city grade signal over the city of license has nothing whatsoever to do with good engineering practices. Section 73.513, on the other hand, is the specific rule which codifies the various rule sections which are applicable to noncommercial applicants, and it excludes Section 73.315. Therefore, a plain reading of the rules, even as presently promulgated, excludes Section 73.315 from applicability to noncommercial applicants.

12. Thus the sole question at hand is whether Semoft is bound by the Commission's intent in its oversight order notwithstanding the fact that the Commission has never properly promulgated its rules to make Section 73.315(a) applicable to noncommercial applicants.

13. As will be discussed below, the Commission's intent to change its rules is not sufficient to require the ultimate penalty imposed here of dismissal of the Semoft application without an opportunity to amend. Such a strict sanction cannot be imposed unless the Commission is likewise held to strict requirements in the promulgation of its rules. In this case, the Commission's failure to properly promulgate its rules renders

dismissal an improper sanction.

14. Moreover, regardless of the efficacy of the Commission's actions in modifying its rules to require noncommercial applicants applying in the commercial band to meet city grade signal requirements, the question remains as to whether FCC Form 340 requires submission of the city grade contour map notwithstanding its inapplicability. The answer is no.

15. Paragraph 10 of Section V-B requires submission of the 1 mv/m contour only. (Semoft did submit its 1 mv/m contour as required). Indeed, footnote 1 of the Memorandum Opinion and Order (FCC 84-327, released July 20, 1984) adopting the revised FCC Form 340 states: "Unlike Section 73.315(a) of the Rules with respect to commercial FM stations, there is no principal city coverage requirement in Subpart C of Section 73 in regard to noncommercial FM stations."

16. In regard to the Commission's letter dismissing Semoft's application, the Commission references Footnote 35 in the Report and Order in Docket 84-750. The Commission states that this footnote indicates that noncommercial stations operating in the commercial band must follow the same rules as commercial stations. Footnote 35 reads: "Noncommercial, educational entities applying for a channel on the commercial band will be subject to the filing window and 'first come/first serve' processing system."

17. Thus the referenced footnote merely makes the "filing window" and "first come/first serve" processing procedures applicable to noncommercial FM stations. This has nothing to do

with the city grade coverage requirements.

18. The Commission also refers to Appendix D to the above order as being somehow applicable to the instant situation. Appendix D states, in pertinent part:

As part of our effort to expedite applications in conjunction with the implementation of the new "window" and "first come, first serve" processing procedures (Report and Order in MM Docket 84-750, Adopted March 14, 1985), we are adopting a new policy with respect to the definition and treatment of applications that are defective or not substantially complete when filed. n1

n 1 This policy applies only to commercial FM applicants. AM applicants and non-commercial FM applicants are still subject to the policy set out in our Public Notice of August 2, 1984. TV applicants remain subject to applicable case law.

...

4g. A map or maps satisfying the requirements of Item 10, Section V-B and clearly and legibly showing the proposed 60 and 70 dBu contours and the legal boundaries of the community of license must be provided. Such maps permit ascertainment of compliance with city-grade requirements and permit verification of signal-strength contour predictions.

19. Thus the referenced Appendix D specifically states that noncommercial applicants are not governed by the same technical requirements as commercial applicants. It is only the "cut-off" procedures which were made applicable to noncommercial applicants and not the technical requirements for "tenderability."

20. Furthermore, Item "4g" above states that the purpose in requiring submission of the contour maps includes ascertainment of compliance with city-grade requirements. Since there clearly were no "city-grade" requirements for noncommercial FM stations when this form was adopted, there would be no reason for submitting a city-grade contour map. Furthermore, the 1 mv/m

contour provides the necessary information for comparative coverage.

21. In any event, the legal ramifications of the Commission's failure to properly promulgate the change in its rules is governed by Rochelle C. Salzer v. FCC, 778 F. 2d 869 (D.C. Cir. 1985). In that case, the court clearly advised the Commission that adequate notice must be given before the Commission can enforce stringent filing requirements such as that suggested in the Commission's letter herein. If the Commission intended to change its rules regarding submission of the city grade contour with noncommercial applications, none of the materials referenced in the Commission's letter would meet the Salzer requirement.

22. The fact is that the rules themselves are at best ambiguous. It is impossible to read Section 73.513 of the Rules and Section 73.315 of the Commission's Rules to require noncommercial applicants to place a city grade signal over the city of license. The only way to determine the Commission's intent is to read the oversight order in which the Commission intended to clarify its position. However, in adopting the oversight order, the Commission stated:

3. These amendments are implemented by authority delegated by the Commission to the Chief, Mass Media Bureau. Inasmuch as these amendments impose no additional burdens and raise no issue upon which comments would serve any useful purpose, prior notice of rule making, effective date provisions and public procedure thereon are inapplicable pursuant to the Administrative Procedure Act. 5 U.S.C. 553(b)(3)(B).

23. The Commission, by its own admission, did not meet the requirements necessary to promulgate any substantive change in



its rules. However, without the modification intended in the oversight rule, there is no basis whatsoever for requiring a noncommercial applicant to place a city grade contour over the city of license. To the extent that the Commission may now argue that the oversight order changed that fact, the Commission must acknowledge that it failed to properly promulgate the change as admitted in its own language adopting the order.

24. As the court stated in Salzer, supra, "fundamental fairness also requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by full and explicit notice of all prerequisites for such consideration." (59 RR 2d at 641). As discussed above, it is clear that the Commission has not provided the required notice necessary to impose the sanction of dismissal of Semoft's application from this proceeding. Under the Salzer decision, Semoft's application must be reinstated.

25. Accordingly, the application of Semoft must be reinstated nunc pro tunc. It is also noted that Semoft's amendment filed March 31, 1988 moots the city-grade contour issue, amending the proposed transmitter location to provide city-grade coverage over Stanton.

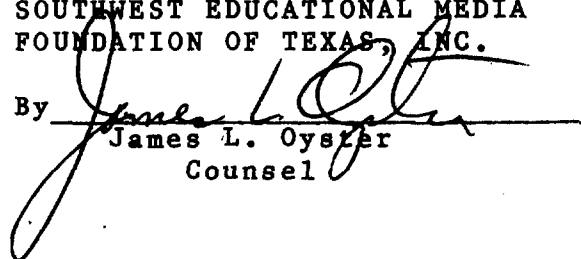
Respectfully submitted,

Law Offices  
JAMES L. OYSTER  
8315 Tobin Road  
Annandale, VA 22003-1101  
(703) 573-6765

April 28, 1988

SOUTHWEST EDUCATIONAL MEDIA  
FOUNDATION OF TEXAS, INC.

By

  
James L. Oyster  
Counsel